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Legal 203-13-00

BEFORE THE  
PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA

DOCKET NO. 1999-469-C

RECEIVED  
MAR 13 2000

In RE: )  
)  
Review of Proposed )  
Guidelines for Rates )  
Set by BellSouth )  
Telecommunications, Inc. )  
Pursuant to )  
S.C. Code Ann. § 58-9-576 )

BELLSOUTH'S RESPONSE TO  
AT&T'S MOTION TO STRIKE

RECEIVED  
MAR 13 2000  
UTILITIES DEPARTMENT

BellSouth Telecommunications, Inc. ("BellSouth"),  
respectfully submits the following memorandum in reply to the  
motion filed by AT&T Communications of the Southern States, Inc.  
("AT&T") requesting the Public Service Commission of South  
Carolina ("Commission") to strike certain portions of the  
testimony of Alphonso J. Varner, pre-filed on behalf of  
BellSouth. As set forth more fully below, the Commission should  
deny AT&T's motion.

1. BellSouth is currently operating under an alternative  
form of regulation pursuant to S.C. Code Ann. § 58-9-576 (Supp.  
1999) ("Section 576"). Subsection (B)(5) of Section 576 requires  
the Commission to adopt certain guidelines applicable to a local  
exchange carrier ("LEC") which elects to be regulated under  
Section 576. As required by the Commission, BellSouth filed  
proposed guidelines on November 12, 1999. The Commission

established this docket to review BellSouth's proposed guidelines.

2. In support of its proposed guidelines, BellSouth filed the direct testimony of Alphonso J. Varner. Mr. Varner has an extensive regulatory background and has testified before the Commission on numerous occasions. Mr. Varner's testimony is straightforward. He explains BellSouth's proposed guidelines and discusses how the guidelines comply with Subsection (B)(5) of Section 576. In response to the testimony filed by certain intervenors, BellSouth also filed the rebuttal testimony of Mr. Varner. Mr. Varner's rebuttal testimony is responsive to issues and assertions raised by other parties of record.

3. Citing Rules 701 and 702 of the South Carolina Rules of Evidence, AT&T has moved to strike a substantial portion of Mr. Varner's direct testimony on the grounds that his testimony constitutes an impermissible "opinion on the ultimate issue for Commission decision, i.e. statutory interpretation." (Motion to Strike, ¶ 2). AT&T has also moved to strike a portion of Mr. Varner's rebuttal testimony on the grounds that such testimony constitutes improper "legal opinions expressed by Mr. Varner, as to which he is not qualified to testify." (Motion to Strike, ¶ 6). Based on Rule 704 of the South Carolina Rule of Evidence, South Carolina case law, and this Commission's role to hear all relevant evidence, AT&T's motion should be denied.

4. Rule 704 of the South Carolina Rules of Evidence states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Accordingly, as an initial matter, AT&T motion should be denied because Mr. Varner's testimony is plainly admissible under Rule 704.

5. Without any detailed explanation, AT&T asserts that portions of Mr. Varner's testimony should be excluded as impermissible legal opinions under Rules 701 and 702 of the South Carolina Rules of Evidence. This assertion is contrary to Mr. Varner's direct testimony in which he clearly stated that he is "not a lawyer and cannot provide a definitive legal interpretation of what is required by the statute." (Varner Direct Testimony, p. 3). Mr. Varner provides background and context, as well as a discussion of the matters the Commission must consider in order to rule in this docket. As AT&T is well aware, Mr. Varner has years of regulatory experience and has testified before this Commission on many occasions. Mr. Varner's testimony is relevant, helpful to a clear understanding of his testimony, and permissible under Article VII of the South Carolina Rules of Evidence and the applicable Commission rules regarding the admissibility of evidence. 26 S.C.Code Ann.Reg. 103-870(A).

6. AT&T asserts that the "S.C. Rules (Evidence) 701 and 702 emphasize that lay persons may not give expert opinions."

(Motion to Strike, ¶ 3). This assertion is inconsistent with the language of Rules 701 and 702. Taken to its logical conclusion, AT&T's interpretation of the Rules of Evidence would lead to the illogical result that only lawyers would be competent to testify as matters such as the issues presently before the Commission. Such an interpretation would lead to an absurd result that only lawyers could testify on such matters which would moot this Commission's dual role as finder of fact and ruler of law. Additionally, such a ruling would require the Commission to strike substantial portions of the testimony filed by the intervenors in this docket, including substantial portions of the testimony filed by MCIWorldCom, Inc., Trivergent Communications, and the South Carolina Public Communications Association. It should be noted that AT&T has failed to move to strike the testimony of any other party in this docket who sponsored opinions similar to Varner's testimony.

7. At most, AT&T's motion attacks the weight to be given to BellSouth's testimony. It is respectfully submitted that the Commission will be able to judge the credibility of any witness's testimony, and to afford such testimony whatever weight the Commission deems appropriate. Consistent with this Commission's precedent set forth in Docket No. 1999-033-C, the Commission should deny AT&T's motion and permit the inclusion of all relevant testimony. See Order No. 1999-665, dated September 21, 1999 (denying motion to strike testimony based on the assertion

that such testimony constituted improper legal opinions). As the Commission noted in Order No. 1999-665:

We also note that, under our ruling, the Commission will be able to judge the credibility of the evidence, and afford it whatever weight we deem appropriate. We have the right to believe it in its entirety, believe portions of it, or reject it completely. We believe that this is the best approach under the circumstances of this case. Therefore, the Motion to Strike is denied.

Id. at 3. A similar result should be reached in this docket.

8. "A motion to strike is addressed to the sound discretion of the trial court; its decision will not be reversed absent a showing of abuse of discretion." Williams v. South Carolina National Bank, 326 S.E.2d 187, 188 (S.C. Ct. App. 1985), citing, Totaro v. Turner, 2543 S.E.2d 800 (S.C. 1979). As stated above, the purpose of this docket is for this Commission to adopt certain guidelines for BellSouth pursuant to S.C. Code Ann. § 58-9-576(B)(5). Accordingly, the Commission has an obligation to consider all properly pre-filed testimony which discusses BellSouth's proposed guidelines and which addresses whether such guidelines meet the requirements of Subsection (B)(5) of Section 576. To strike such relevant testimony would be tantamount to an abuse of discretion.

9. By its nature, rebuttal testimony is responsive to testimony filed by other parties. In addition to reasons set forth above for denying AT&T's motion, to strike certain portions

of BellSouth's rebuttal testimony denies BellSouth a full and fair opportunity to address issues raised by other parties and is tantamount to a denial of due process.

WHEREFORE, for the reasons stated above, it is respectfully submitted that the Commission should deny AT&T's motion to strike.

Respectfully submitted,



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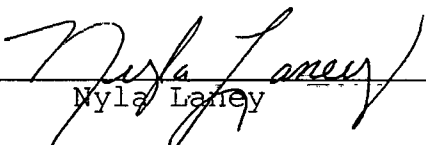
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